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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMON MING,

Defendant and Appellant.

B291172

(Los Angeles County  
Super. Ct. No. LA086740)

APPEAL from a judgment of the Superior Court for Los Angeles County, Martin Larry Herscovitz, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David E. Madeo and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Damon Ming appeals from a judgment sentencing him to 16 years in prison after a jury found him guilty of three counts of forcible rape (Pen. Code,<sup>1</sup> § 261, subd. (a)(2)) and misdemeanor false imprisonment, as a lesser-included offense of felony false imprisonment by violence (§§ 236/237, subd. (a)). Defendant raises a single issue on appeal; he contends the trial court erred in imposing consecutive sentences for two of the rape counts. Finding no error, we affirm.

## **BACKGROUND**

In the early morning hours of September 3, 2017, defendant saw 21-year-old Joanna D. walking away from a taco stand. Defendant, who was in his car, enticed Joanna, who had just moved to Los Angeles, to get into his car; he said he was a music producer who scouted girls to be models, and invited her to go with him to a party where he could introduce her to important people.

As defendant was driving them to North Hollywood, he said he wanted to stop at a “chill spot” so he could “freshen up” and change clothes. When they arrived at that location—a large home that was divided into studio units—Joanna said she would wait in the car. Defendant told her, “No, no. It’s okay. I’m not going to rape you or anything,” so Joanna agreed to go inside.

They entered a small studio apartment, and Joanna sat on the edge of the bed because there were clothes on the only chair in the

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

room. Defendant went behind a curtain that separated the room from the bathroom, and Joanna heard water running. When he returned to the room, he was not wearing a shirt or pants. He lay down on the bed, and said he was tired. A few minutes later, he showed Joanna photographs of naked women on his phone, and asked Joanna if she was interested in escort work. She said she was not and, after he showed her a photograph of a naked woman sitting on the bed they were sitting on, she told him she wanted to leave.

Joanna said that she was calling for an Uber and walked to the door. Defendant grabbed her wrist and pulled her back to the bed. Joanna surreptitiously dialed 911, but the call did not go through. She dialed 911 again, thinking that the operator would understand what was happening; part of the encounter was recorded by the 911 operator.<sup>2</sup>

After defendant pulled Joanna back onto the bed, he told her he wanted her to hold him; she refused and said she wanted to go home. He then demanded that she remove her clothing, and when she refused, he removed it as she tried to resist. He then took off his shorts and told Joanna to orally copulate him. When she refused, defendant slapped her in the face, then put his hands around her neck, so she complied.

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<sup>2</sup> A police service representative testified that the emergency call system, which recorded Joanna's 911 call, was unable to determine Joanna's precise location when the call was made shortly before 5:00 a.m. on the morning of September 3, 2017.

Defendant told Joanna that he had “something” for her, and he went into the bathroom. He returned with baby oil, and ordered Joanna to get into a “doggy style” position. When she refused, he pushed her face onto the mattress. He rubbed baby oil on his penis and her vagina and put his finger in her anus, scraping it. Joanna tried to get away, but defendant yanked her back and told her to stay still. He then inserted his penis into her vagina and removed it numerous times, repeatedly shifting Joanna into different positions; he seemed to be trying to get an erection, and kept moving her back to the “doggy style” position because it seemed to work better for him. This continued for the rest of the night, until defendant got tired; he lay down, grabbed Joanna’s arm, and told her to lie next to him. Joanna said that she wanted to go home, but he told her that she was not going anywhere and wrapped his arm around her to prevent her from leaving. Every time Joanna tried to move, thinking defendant was asleep, he held her tighter.

Both Joanna and defendant eventually fell asleep. When Joanna woke up, it was daylight.<sup>3</sup> Defendant also woke up and said, “Okay. Let’s try again.” Joanna refused. Defendant then forced her into the “doggy style” position; when she scooted away, defendant grabbed her, and then repeatedly inserted his penis into her vagina. When he stopped, Joanna dressed as fast as she could. As soon as defendant went into the bathroom she ran out of the room and went outside,

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<sup>3</sup> Joanna tried making another 911 call at 6:16 a.m., shortly after she woke up, but it did not go through.

where she called 911 and finally was able to speak to an operator; the call was made at 7:55 a.m. The police arrived and arrested defendant shortly thereafter.

Defendant was charged by information with three counts of forcible oral copulation (§ 288a, subd. (c)(2)(A)), five counts of forcible rape (§ 261, subd. (a)(2)), one count of forcible sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)), and one count of false imprisonment by violence (§ 236).<sup>4</sup> The forcible rape counts—counts 2, 4, 7, 9, and 10—contained identical language (although count 2 mistakenly contains the wrong date), and simply alleged that defendant “did unlawfully have and accomplish an act of sexual intercourse with a person . . . not his/her spouse, against said person’s will, by means of force, violence, duress, menace and fear.”

The jury returned guilty verdicts on the first three counts of forcible rape and the lesser included misdemeanor offense of false imprisonment rather than felony false imprisonment by violence. The jury acquitted defendant on the sexual penetration by a foreign object count, and was deadlocked on the three counts of oral copulation and the remaining two counts of forcible rape.

The trial court imposed a total sentence of 16 years in prison, computed as follows. On the three rape counts, the court imposed the upper term of eight years on count 2, a concurrent eight-year upper

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<sup>4</sup> The oral copulation counts were counts 1, 6, and 8. The rape counts were 2, 4, 7, 9, and 10. The sexual penetration with a foreign object count was count 3. The false imprisonment by violence count was count 5.

term on count 4, and a consecutive eight-year upper term on count 7. In finding that consecutive sentences should be imposed for counts 2 and 7, the court reasoned that count 7 related to defendant's conduct after he fell asleep and then woke up, and therefore the crimes were committed on separate occasions because defendant had had the opportunity to reflect upon his actions. On the false imprisonment count, the court imposed a one-year sentence in county jail, to run concurrently with the sentences on the rape counts. The court exercised its discretion under section 1385 and dismissed the remaining counts.

## **DISCUSSION**

Section 667.6, subdivision (d) provides, in relevant part: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) [which includes forcible rape] if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."

Defendant contends the trial court erred in imposing consecutive terms on the rape counts<sup>5</sup> under section 667.6, subdivision (d)<sup>6</sup> because the acts of penetration that took place after defendant woke up were uncharged, and there was no intervening act between defendant's acts of penetration before he fell asleep. Defendant's argument rests on a faulty premise: that all three rape convictions were based upon the acts that occurred before defendant fell asleep.

We begin by noting that defendant offers no support for his assertion that the acts of penetration after he woke up were uncharged. In fact, the information charged defendant with five counts of rape, using identical language that did not specify which act was at issue in each count. Thus, it cannot be said that the acts that occurred after defendant woke up were uncharged.

The only other support defendant offers for his assertion that all three rape convictions were based upon the acts that occurred before defendant fell asleep is the prosecutor's explanation to the jury of the five rape counts. The prosecutor told the jury: "In sex cases, every

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<sup>5</sup> We note that counsel for defendant on appeal appears to be under the impression that defendant was given consecutive sentences for all three rape convictions. Counsel is mistaken. Defendant was sentenced to consecutive terms for two of the rape convictions—counts 2 and 7—and a *concurrent* term for the other rape conviction (count 4).

<sup>6</sup> Although the first sentence in the argument section of appellant's opening brief makes reference to subdivision (c) as well as subdivision (d) of section 667.6, there is no further discussion of subdivision (c). Because the trial court imposed the consecutive sentences under subdivision (d), and merely stated that he could have done so under subdivision (c), we limit our discussion to subdivision (d).

insertion is a separate sex act, and each of those acts constitutes a separate charge. In this case, we have ten charges total. False imprisonment, in chronological order, is the first, and that's count five. Oral copulation is counts one, six, and eight. The sexual penetration—that is, defendant putting his thumb into Joanna's anus—that's count three. The next in order is the rape, the doggy-style sex that Joanna describes happening at night, and that's counts two, four, and seven. And then, finally, the rape in the morning after the sun comes up, that is counts nine and ten."

Defendant improperly relies upon the prosecutor's statement to conclude that the jury necessarily convicted defendant only of the rapes he committed before he fell asleep, because he ignores what happened subsequently. During deliberations, the jury sent out the following question: "Does the order of the counts indicate chronological order (i.e., in order of time?) of events?" The court responded, "No." A short time later, the jury sent out another question: "Can we address each count in order of chronology of time where there are multiple counts of the same act/crime?" The court responded by telling the jury, "It is up to you to decide the order in which you consider each crime and the relevant evidence," and then directed the jury's attention to jury instruction CALCRIM No. 3501, which the court read aloud to the jury. As given, that instruction stated: "The defendant is charged with three counts of forcible oral copulation and five counts of rape. The People have presented evidence of more than one act to prove that the defendant committed these offenses. [¶] You must not find the defendant guilty unless, one, you all agree that the People have proved



that the defendant committed at least one of these acts and you all agree on which act he committed for each charged offense, or two, you all agree that the People have proved that the defendant committed all of the acts alleged to have occurred and have proved that the defendant committed at least the number of offenses charged.”

From the jury’s questions, it appears the jury was confused about whether it was required to follow the prosecutor’s implication that counts 2, 4, and 7 necessarily were the first three acts of penetration. And the court very clearly instructed them that the jury was not so required, and that all that was required was that the jury agree on which act was committed for each of the counts on which it reached a guilty verdict. We presume the jury followed these instructions rather than the prosecutor’s statement in closing argument, mindful of the United States Supreme Court’s observation that “[p]articularly in a criminal trial, the judge’s last word is apt to be the decisive word.” (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) Therefore, the trial court reasonably could (and did) conclude that one of the rape convictions arose from defendant’s acts after he woke up.

Having found support for the trial court’s conclusion regarding the bases for the rape convictions, we now address whether the court erred by imposing consecutive sentences for two of the rape convictions on the ground that they were committed on separate occasions. “Once the trial court has found, under section 667.6, subdivision (d), that a defendant committed the sex crimes on separate occasions, we will reverse ‘only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before

resuming his assaultive behavior.” (*People v. King* (2010) 183 Cal.App.4th 1281, 1325.) Defendant does not argue in either his opening brief or his reply brief that no reasonable trier of fact could have concluded that defendant had an opportunity for reflection after the first round of sexual assaults, when he lay down and slept, before he resumed his assaultive behavior. Nor could he.

The evidence shows that after defendant completed that last rape, he lay down and forced Joanna to lie next to him, keeping his arm wrapped around her to prevent her from leaving. He eventually fell asleep, and when he woke up, he said, “Okay. Let’s try again,” and then proceeded to rape her again. This evidence overwhelmingly supports the trial court’s determination that the two rapes were committed on separate occasions under section 667.6.

### **DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.